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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GEROME HENDRICKS,

Defendant and Appellant.

B238049

(Los Angeles County
Super. Ct. No. MA040987)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Kathleen Blanchard, Judge. Affirmed.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Blythe Leszkay and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

Jerome Hendricks was previously convicted of spousal rape (Pen. Code,¹ § 262, subd. (a)(1)). In an earlier appeal, this court concluded that the trial court erred when it ordered him to register as a sex offender under the mandatory provisions of section 290. We remanded the matter to permit the trial court to assess whether Hendricks should be subjected to sex offender registration under section 290.006. The trial court ordered him to register as a sex offender under this provision, and Hendricks appeals. He asserts that the court's order that he register as a sex offender, with its attendant residency restriction, violates his Sixth Amendment right to a jury trial because the judge, not a jury, made the factual findings upon which the registration order was based. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Hendricks pleaded no contest to spousal rape. All facts in this portion of this opinion pertaining to the offense are taken from the transcript of the preliminary hearing; Hendricks and his counsel stipulated that the preliminary hearing transcript afforded a factual basis for the plea.² As of January 13, 2008, T.B. had been married to Hendricks for eight years. Although they were married, T.B. did not permit Hendricks to sleep in her house because he had sexually mistreated her in the past, forcing her to engage in anal intercourse without her consent.

At approximately 3:00 in the morning on January 13, Hendricks drove T.B. to the hospital because she was sick with the flu. After her hospital visit, the two walked back to Hendricks' big-rig truck. T.B. lay down in the back of the big rig because she was vomiting.

Hendricks joined T.B. in the back of the truck, lying down next to her. In a demanding tone, he told her to turn over. T.B. knew Hendricks wanted to engage in anal intercourse, and she did not want it. She said, "Please don't do this." She told him she

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

² At Hendricks's request, we take judicial notice of the appellate record from his prior appeal, *People v. Jerome Hendricks* (Nov. 10, 2010, B218791) [nonpub. opn.].

did not want to have anal intercourse. Hendricks responded angrily, “Shut the fuck up and turn over.” T.B. was afraid and felt she had no choice; she turned over.

Hendricks told T.B. to take her pants down. T.B. pleaded, “Please don’t do this again. I don’t want to do this. I’m sick. I have diarrhea, and I’m vomiting.” Hendricks pulled down his pants and underwear, exposing his penis.

T.B. said to Hendricks, “Gerome, if you are going to do this, do you have any Vaseline?” Hendricks grabbed some Vaseline and said, “Don’t move. If you move, I’m going to hurt you.” T.B. began to cry. Hendricks told her to “[s]hut the fuck up” and spread Vaseline in her anal area.

Hendricks forced his penis into T.B.’s anus. T.B. cried and said, “Stop, it hurts, and I don’t feel good.” Hendricks told her, “Shut the fuck up. You talk too much.” T.B. reported that Hendricks appeared to be “enjoying it.”

Hendricks removed his penis from T.B.’s anus and placed it in her vagina. T.B. did not consent to this either. She said, “Please stop. It hurts. I don’t want to do this. I’m your wife. How could you do me like this?”

T.B. had been on her back while Hendricks penetrated her vagina. He then instructed T.B. to turn over again. He inserted his penis into her anus again. According to T.B., “he was enjoying what he was doing. He was making noises, like I could tell he was enjoying it. It felt good, like ooh, aah. I mean, just the normal sexual noises.”

T.B. was still crying and she was in pain. She told him to stop. She asked if she could use the restroom because she was vomiting and having diarrhea. He gave her a bag from the floor, which she placed beneath her buttocks.

At some point Hendricks permitted T.B. to sit up. She told Hendricks that he was “dealing with a demonic spirit.” He told her, “Shut the fuck up,” and “How are you going to tell me I’m dealing with a demonic spirit[?]” and then ordered her to turn over again. Hendricks then inserted a water bottle into her anus. T.B. was in pain. She told him, “I can’t take it anymore. Please let me go.”

Hendricks finally stopped. T.B. asked him to take her home so that she could clean herself. He accused her of planning to call the police, but eventually he permitted

her to put her clothes on and he drove her home. T.B. was experiencing pain in her anal area.

When she got home, T.B. drove to her mother's home. After she got there, diarrhea and blood began running down her legs. She went to the police station and was directed to go to the hospital. The subsequent medical examination revealed cuts and tears in her vaginal and anal areas, as well as a hickey on her neck.

Hendricks was H.I.V. positive. He did not use a condom.

Hendricks was charged with spousal rape, two counts of sodomy by use of force (§ 286, subd. (c)(2)), sexual penetration by a foreign object (§ 289, subd. (a)(1)), and corporal injury to a spouse (§ 273.5, subd. (a)). He pleaded no contest to spousal rape and was found guilty of that offense. The remaining counts were dismissed.

The court sentenced Hendricks to four years in state prison and ordered him to register as a sex offender under section 290. Hendricks appealed, and this court concluded that the trial court had erred when it ordered him to register as a sex offender under section 290. (*People v. Hendricks* (Nov. 10, 2010, B218791) [nonpub. opn.].) We remanded the matter to permit the trial court to assess whether Hendricks should be subjected to sex offender registration under section 290.006. (*Id.* at p. 6.)

On remand, the trial court stated that at the original sentencing hearing it should have “ma[d]e the record I’m making now, which is that I absolutely believe, without a shadow of a doubt, that this crime was committed for the purpose of sexual gratification. The defendant made that very clear in both his actions and his words to the victim. Therefore, I am ordering the registration under Penal Code section 290.006.” The court added, “Inherent in the fact that I have the discretion [to order registration], it also means that I have the discretion not to. I can’t imagine an individual that should register any more than Mr. Hendricks. What he put this woman through is exactly why he needs to be on the registry, needs to be—have law enforcement know where he is, make sure that he’s living at an appropriate place when he does get out of state prison because he poses a huge danger to society at large and this victim also, in particular.”

Hendricks appeals the sex offender registration requirement.

DISCUSSION

Section 290 provides for mandatory sex offender registration for those convicted of enumerated sexual offenses. Section 290.006 permits the trial court to order sex offender registration on a discretionary basis for those who have committed offenses other than those that trigger mandatory registration under section 290. Discretionary registration may be ordered “if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification.” (§ 290.006.) The trial court made such a finding here, and ordered that Hendricks be subject to sex offender registration under section 290.006.

All registered sex offenders in California are barred from residing within 2,000 feet of a school or park where children gather. (§ 3003.5, subd. (b).) Hendricks contends that being subjected to this residency restriction constitutes punishment that increases the penalty for his spousal rape offense beyond the maximum punishment permitted by statute, and that he could not constitutionally be subjected to sex offender registration without a jury finding the facts supporting registration to be true beyond a reasonable doubt. (See, e.g., *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).) The question of whether this residency restriction is an increase in penalty for the purposes of the Sixth Amendment and cases interpreting the right to a jury trial is presently pending before the California Supreme Court. (*People v. Mosley*, S187965, review granted Jan. 26, 2011.)

Assuming for the sake of argument that Hendricks is correct that the trial court erred in requiring him to register as a sex offender without having a jury find beyond a reasonable doubt the predicate facts required to impose a registration requirement under section 290.006, we determine whether the failure to submit the factual question of whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification (§ 290.006) was prejudicial. *Apprendi* error is not reversible per se but is reviewed under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18. (*People v. Sandoval* (2007) 41 Cal.4th 825, 838.) We therefore

decide whether we are convinced beyond a reasonable doubt that a jury would have determined that the offense was committed as a result of sexual compulsion or for purposes of sexual gratification. (See *id.* at pp. 838-839.)

We have no difficulty in concluding that under the circumstances presented by this case, a jury would have found beyond a reasonable doubt that the spousal rape was committed for the purpose of sexual gratification. According to the probation report, which Hendricks stipulated could be relied upon at sentencing, Hendricks told T.B., “I want that ass,” and “I want that pussy!” prior to forcing his penis into her anus and vagina. When she protested, he told her that “other women love what he does to them.” During the sexual assault, T.B. testified, Hendricks “was enjoying what he was doing. He was making noises, like I could tell he was enjoying it. It felt good, like ooh, aah. I mean, just the normal sexual noises.” Hendricks moaned while he penetrated her. There is no doubt that a jury faced with this evidence would have determined Hendricks committed spousal rape for purposes of sexual gratification. Accordingly, even if the Sixth Amendment is interpreted to require that this factual determination be made by a jury, the court’s determination that Hendricks committed the crime for sexual gratification did not prejudice Hendricks.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.